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PERSONAL LIABILITY OF ONE ASSUMING PAYMENT OF A DEED OF TRUST.

IT SEEMS to be well settled that where one takes a conveyance subject to a deed of trust, and without promise to pay the debt secured thereby, there is no personal liability therefor; but the land is the sole security for the debt, and if a deficiency results upon foreclosure no personal liability can be enforced.[1] It seems to be equally well settled that where the alienees of the mortgagor have specifically assumed payment of a debt secured by deed of trust, the mortgage creditor is entitled to the benefit of the covenant, for which the deed is merely security, and may, therefore, proceed upon the covenant alone, or may first exhaust the security and then proceed upon the covenant for any deficiency.[2] So far as the mortgagor himself is concerned, there is no difficulty; but when the mortgage creditor undertakes to hold the grantee of the mortgagor upon his covenant to pay the debt of the mortgagor, we are at once confronted with the objection that there is no privity of contract between the parties, since the promise to pay is made to the mortgagor and not to the mortgagee, and also questions relative to the consideration which moves solely from the mortgagor.

The Virginia court has avoided these difficult and perplexing questions by holding liable the subsequent alienees of the mortgagor who have assumed the debt, upon the equitable theory of subrogation, taking the position that in such case the mortgage creditor is entitled, not only to the specific lien created by the mortgage, but as well to all collateral securities held by his debtor to secure the obligation, which would include the personal obli-

[1] Bumgardner *v.* Allen, 6 Munf. (Va.) 439 (1819); Ellett *v.* McGhee, 94 Va. 377, 26 S. E. 874 (1897); Whitlock *v.* Gordon, 1 Va. Dec. 238 (1877); Osborne *v.* Cabell, 77 Va. 462 (1883).

[2] Cases *supra;* Willard *v.* Worsham, 76 Va. 392 (1882); Francisco *v.* Shelton, 85 Va. 779, 8 S. E. 789 (1889); Fisher *v.* White, 94 Va. 236, 26 S. E. 573 (1897); Tatum *v.* Ballard, 94 Va. 370, 26 S. E. 871 (1897); Moore *v.* Triplett, 96 Va. 603, 32 S. E. 50 (1899); Wasserman *v.* Metzger, 105 Va. 744, 54 S. E. 893 (1906).

gation of the mortgagor's grantee.[3] So long, then, as the chain of assumptions by successive alienees of the mortgagor remains complete and unbroken, the mortgage creditor may proceed by bill in equity against the last assumer as principal, and his predecessors in title as sureties, to compel the performance of the personal covenant.[4] Moreover, it has been clearly held by the Virginia court that, in such case, the equitable remedy is exclusive, and there is no remedy at law as against the subsequent alienee—covenantors of the mortgagor.[5] The correctness of this last decision is at least questionable, but will be discussed later.

But let us suppose that the chain of assumptions has been broken, and in order to present the question in concrete form, let us assume that A has sold land to B, who executes and delivers to A a deed of trust for the purchase price; B then sells to C, who covenants and agrees to assume payment of the deed of trust and the debt thereby secured; C sells to D, who does not assume payment of the debt; and D then sells to E, who does covenant to pay the debt. The land is sold under the trust deed, a deficiency resulting. What, if any, are A's rights against E on his covenant? Obviously, under the equitable doctrine of Willard *v.* Worsham [6] and Osborne *v.* Cabell,[7] A would have no rights whatever against E; for the liability of the alienee being based upon the right of the creditor to subrogation, and E's immediate predecessor in title being under no personal liability to A, the latter cannot claim the benefit of E's promise to D, as "collateral security."

A, then, being barred of his equitable remedy against E, must assert his rights, if any, in a legal forum, in an action of covenant or assumpsit. It will be noted that in McIlvane *v.* Big Stony Lumber Co.,[8] it was held that the equitable remedy was exclusive, and no action at law would lie against the mortgagor's alienee upon his covenant. That, however, was a case in which

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[3] Cases *supra.*

[4] Willard *v.* Worsham, *supra;* Osborne *v.* Cabell, *supra.*

[5] McIlvane *v.* Big Stony Lumber Co., 105 Va. 613; 54 S. E. 473 (1906).

[6] *Supra,* note 2.

[7] *Supra,* note 1.

[8] *Supra,* note 5.

the chain of assumptions was unbroken and in which, therefore, the right to the equitable remedy clearly existed; while in the case under discussion A is without remedy against E, unless it be the legal remedy suggested. Whether or not that remedy is available obviously involves (1) the question of the enforceability of contracts made for the benefit of a third party, and (2) whether a covenant of the nature of that in question is in fact a covenant for the benefit of the mortgagee at all.

The latter inquiry is satisfactorily answered by the Virginia court in the recent case of Casselman *v.* Gordon,[9] in which Judge Kelly, speaking for the court, observes that the covenant must, if it is to be given any effect at all, be for the benefit of the mortgagee, since it cannot relate to the exoneration of the covenantor's grantor, who had not undertaken to pay the debt and was therefore under no obligation to do so. A different view of the question is suggested, however, by Professor Williston.[10]

The law in Virginia relative to enforcement by the beneficiary of a contract to which he is not a party is in a more or less confused and unsatisfactory condition, due largely, it is believed, to the wording of Section 2415 of the Code, and a misconception of the purpose and effect of that statute. It is proposed first to state the common law principles applicable to contracts of this nature, and then to endeavor to ascertain what changes and modifications of the common law have been effected by the statute in question.

The Common Law.[11]

> "There are two quite distinct types which pass current under the name of promises for the benefit of a third person. To the first class belong promises where the promisee has no pecuniary interest in the performance of the contract, his object in entering into it being the benefit of a third person. To the second class belong promises where the promisee seeks indirectly to discharge an obligation of his own to a third person by securing from the promisor, a promise to

[9] 118 Va. 553, 88 S. E. 58 (March 16, 1916).

[10] Wald's Pollock, Contracts, Williston's ed., 265.

[11] For general discussion of subject, see Wald's Pollock, Contracts, 3rd ed.; 2 Elliott, Contracts, §§ 1405-1404; 9 Cyc. 374, *et seq;* 30 Cyc. 59, *et seq.*

pay this creditor. These two classes are frequently treated as if their correct solution depended upon the same principles, but there are important distinctions." [12]

For a considerable period in England, the attitude of the courts with reference to both of these classes of contracts is not entirely clear, although it was definitely held that if the beneficiary was a near relative of one or both of the contracting parties, the contract was enforceable by the beneficiary in his own name.[13] There are, also, quite a number of early decisions which seem to sustain the beneficiary's right of action in other cases.[14] Since the decision in Tweddle *v.* Atkinson,[15] however, the doctrine seems to be definitely established in England that one who is not a party to a contract can, in no case, maintain an action thereon.[16]

The early American cases reflected the uncertainty existing in the English courts touching the extent and rationale of the doctrine; but the limits of this article forbid an attempt even to outline the course of decision marked by numberless cases dealing with the various phases of this difficult question. It must suffice to say that in that class of cases where the promisee takes no benefit by the contract practically all of the courts of this country today permit a common law action by the beneficiary in his own name, the exceptions being the courts of Massachusetts, Connecticut, Michigan, Minnesota, Vermont, New Hampshire, Virginia, West Virginia, Pennsylvania and the Federal courts.[17] So where the promisee himself is beneficially in-

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[12] Wald's POLLOCK, CONTRACTS, 3rd ed., 242; see also the very valuable discussion of Prof. Hepburn in 30 CYC. 59, *et seq.*

[13] Dutton *v.* Pool, 2 Lev. 210 (1677). Approved by Lord Mansfield, in Martyn *v.* Hind, 2 Cowp. 437, 443 (1776).

[14] Feltmakers *v.* Davis, 1 Bos. & Pul. 98 (1797); Pigott *v.* Thompson, 3 Bos. & Pul. 147 (1802); Bell *v.* Chaplain, Hardr. 321; Marchington *v.* Vernon, 1 Bos. & Pul. 101, note.

[15] 1 B. & S., 393 (1861).

[16] Playford *v.* United Kingdom Tel. Co. (1869), L. R. 4 Q. B. 706; Dickson *v.* Reuter's Telegram Co. (1877), 2 C. P. D. 62 in C. A. 3 C. P. D. 1, 47 L. J., C. P. 1; Cleaver *v.* Mutual, etc., Life Assn. (1891), 1 Q. B. 147.

[17] The authorities are fully collated in Wald's POLLOCK, CONTRACTS, 3 ed., 249; 30 CYC. 65.

terested in the performance of the contract, a very great majority of the American courts have conceded a right of action at law to the third party—beneficiary, the exceptions in this case being the courts of Connecticut, Massachusetts, Michigan, North Carolina, Indiana, Virginia, West Virginia, Maryland, New Hampshire, Pennsylvania, Wyoming and the Federal courts. In the five last-named jurisdictions, however, the rejection of the doctrine is not equivocal.[18] In the case of an action at law by the mortgagee against the mortgagor's grantee, a still more liberal attitude in upholding the jurisdiction of the legal forum is observable, the only jurisdictions, apparently, where the legal action is not permitted by common law or by statute, being Massachusetts, North Carolina, Virginia, West Virginia, Maryland and the Federal courts.[19]

The only case in this state prior to the statute in which the question is discussed is Ross *v.* Milne,[20] decided April, 1841. In that case, by deed *inter partes,* Ross contracted with one Janet Smith, upon valuable consideration passing from the latter to the former, to pay to Jane Milne the sum of five hundred pounds sterling two months after the death of said Janet Smith. Upon breach of the covenant, Jane Milne brought her action of debt against Ross. The declaration contained two counts, the first of which was based on the covenant in the deed, and the second of which set up a parol contract to the same effect. The questions squarely presented to the appellate court were: First, whether or not one not a party to a deed *inter partes* could maintain an action upon a covenant therein contained for the benefit of such party; and, second, whether or not such action could be maintained upon a parol contract where there was no consideration moving from the beneficiary to either of the contracting parties. The court answers both questions in the negative, in a lengthy opinion by Tucker, P., which reviews the English and American authorities of that day.

The first inquiry is determined upon the broad general principle that one not a party to a deed *inter partes* can enforce no

[18] Wald's POLLOCK, CONTRACTS, 3 ed., 256; 30 CYC. 67, 69, note 31.
[19] Wald's POLLOCK, CONTRACTS, 3 ed., 260, note 6.
[20] 12 Leigh 204, 37 Am. Dec. 646 (1841).

rights thereunder at common law. The principles of law underlying the decision of the second inquiry are summarized in the opinion as follows: [21]

> "No executory contract has any force, unless it be for value; and moreover, wherever a valuable consideration is essential to an agreement, the legal interest in the simple contract resides with the party from whom the consideration moves, notwithstanding it may enure for another's benefit, or even is to be performed to another person. * * *
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> "Upon the whole, therefore, I am of opinion, that Mrs. Milne had no rights under this supposed contract. But if she had, I am still of opinion they could only be enforced in equity. For it is not perceived, that Mrs. Smith's representative had no concern or interest in the matter: he represents her with whom the contract was made by Ross, and from whom the consideration moved. Accordingly, in one case where the right of the beneficiary to sue was sustained, the right of the promisee to sue was also admitted; Bell *v.* Chaplain, Hardr. 321. But this leads to one of two consequences; either that the recovery here would not be a bar to the suit of the representative of Mrs. Smith, or it would be a bar. If it would not be a bar, then the defendant would be twice charged: if it would be a bar, then the representative of the promisee would be concluded by a proceeding to which he is no party. If then Mrs. Milne has rights, it is safest that they be asserted in equity, where all the parties can be convened; or that, at least, the suit should be brought in the name of Mrs. Smith's administrator, that, by being a party upon the record, any controversy between him and Mrs. Milne, as to her rights, may be collaterally decided by the usual proceedings in similar cases."

It will be observed that Ross *v.* Milne belongs to that class of cases in which the third party is the sole beneficiary; the promisee, Mrs. Smith, deriving no pecuniary benefit from the contract.

On the other hand, it would appear from certain expressions of Judge Tucker in that case that the court was of opinion that in certain instances an action by the third party would lie. Thus, in discussing Piggott *v.* Thompson,[22] he says: [23]

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[21] Pp. 225, 226.

[22] *Supra,* note 14.

[23] P. 224.

"The case of Pigott *v.* Thompson, 3 Bos. & Pull. 147, contains but an *obiter dictum* of Lord Alvanley, in which his brethren differed from him; though I am ready to admit the correctness of his proposition, wherever the promise to pay the third person is on valuable consideration, or where the consideration moved from that person himself, as was the case in Louther *v.* Kelly, 8 Mod. 115."

And further on he says: [24]

"And where A. was indebted to B. and B. to C. and B. gave an order to A. to pay C. and the order was accepted by A.—C. was admitted to sue A. for the amount. This case has indeed been questioned, though I think without sufficient reason, since A.'s acceptance formed a new contract, for which the transaction furnished a sufficient consideration."

This last is clearly a case where the promisee, as well as the third party, was a beneficiary of the agreement, and yet, according to this *dictum*, the third party was thought to have an action. Nor was the Virginia court alone in its opinion of the status of the then existing law. The Massachusetts court was clearly committed to the doctrine that the third-party-beneficiary might sue in his own name.[25] And Mr. Robinson, after considering a number of cases, thus summarizes the English law as it was then considered to be: [26]

"Although then the rule of the common law is that those parties only can sue or be sued upon an indenture who are named or described in it as parties, it is clearly established in England that this rule is applicable to deeds only and is not extended to other written contracts. Parke, B., 9 M. & W. 95."

Cosmopolitan Life Ins. Ass'n *v.* Koegel,[27] though decided many years after the passage of section 2415 of the Code, is

[24] P. 226.

[25] Brewer *v.* Dyer, 7 Cush. 337 (1851); Felton *v.* Dickinson, 10 Mass. 237 (1813); Hall *v.* Marston, 17 Mass. 575 (1822); Arnold *v.* Lyman, 17 Mass. 400 (1821). These cases are overruled by later decisions of the court and Massachusetts now adopts the English rule in all its stringency.

[26] 3 ROBINSON, PR., p. 20.

[27] 104 Va. 619, 52 S. E. 166 (1905).

based upon common law principles and is decided without reference to the statute. The facts of that case were as follows: The Royal Tribe of Joseph promised and agreed to pay to the plaintiff two thousand dollars on the death of her husband. Her husband died and the debt then became due and payable. Subsequently, the defendant promised and agreed, in consideration of the assets of the Royal Tribe of Joseph turned over to it, to pay, among others, this debt; and, further, at a subsequent date, specifically promised and agreed to pay this debt due to the plaintiff, evidenced by the certificate of the Royal Tribe of Joseph. Cardwell, J., for the court, says:

> "But the defendant insists that, as the plaintiff is a stranger to the consideration for which that promise and agreement was made, she cannot maintain this action, and that it could be maintained by the Royal Tribe of Joseph alone, and this upon the theory that there must be a privity between the plaintiff and defendant in order to render the defendant liable to an action by the plaintiff on the contract. This is undoubtedly the general rule; but it has its exceptions, like many other general rules.
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> "That rule, as stated by Metcalf, J., in Mellin *v.* Whipple, I Gray 321, and Ross *v.* Milne, 12 Leigh 204, 37 Am. Dec. 646, and many other cases which need not be referred to, was recognized with express approbation by Mr. Justice Gray in Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6, and in Exchange Bank of St. Louis *v.* Rice, 107 Mass. 41, 9 Am. Rep. 1; but he also carefully considers the exceptions to the rule, and they were regarded to be as firmly established as the rule itself. The principal exception referred to consists of those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund which certain creditors of the depositor are to be paid, and promises, by his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors. See note to 1 Chitty on Pl., p. 5, where a number of cases are cited as belonging to a class in which it is said 'the law [in such cases] creates the privity and implies the promise.'"

The rule of the early Massachusetts cases (of which a number

are referred to in the opinion) is approved in the following language: [28]

> "In the one class of cases the principle is applied where it is money that the defendant has which equitably belongs to the plaintiff, and in the other *where the defendant has either money or property in consideration of which he has promised to pay the debt due the plaintiff by his debtor, from whom the defendant acquired such money or property and to whom the promise was made,* and in either case the law creates the privity and implies the promise necessary to support an action on the part of the plaintiff to recover his debt of the defendant."

The plaintiff's right to recover was sustained.

Wherein does the position of the insurance company in this case differ from that of the mortgagor's grantee who assumes payment of the mortgage debt? Obviously the beneficiary under the policy was not the sole beneficiary of the contract between the Royal Tribe of Joseph and the insurance company, nor was that contract made primarily for her benefit. Neither can it be seriously urged that the fund transferred to the insurance company was a trust fund for the benefit of policy holders; the matured policy simply represented a debt due, and the relation between the company and policy holder was analogous to that of bank and depositor.

An interesting and close analogy to the foregoing is presented in Taliaferro *v.* Day,[29] where one who accepted and used a devise which had been charged with the payment of a legacy, was held personally liable therefor. The decision does not rest upon a trust theory, since the court specifically holds that the devisee will be liable although the burden of the legacy exceed the value of the devise. If the devisee is liable in this case to the third party solely by virtue of his implied promise at common law, and without reference to statute, why not the mortgagor's grantee upon his express promise?

That the beneficiary of a simple contract to which he is a stranger acquired a common law right of action thereon is maintained by Professor John B. Minor. He says: [30]

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[28] Author's italics.

[29] 82 Va. 79 (1886).

[30] 4 MINOR, INST., 3 ed., 450-1.

"In actions *ex contractu* the general principle is that the action must be brought by the person who *has the legal title* to the benefit of a contract, inasmuch as a court of law does not usually take cognizance of an *equitable title.* But this principle, which was once universal, has, in process of time, in *personal actions,* come to be subject to many exceptions. Thus, in contracts *not under seal,* it has been held, for two centuries or more, that anyone *for whose benefit* the contract was made may sue upon it; that is, if A promises Z, not under seal, but for valuable consideration, to pay B $1000.00, B may in his own name maintain an action on the promise against A. (1 Chitty Pl. 4, 5.) But where the promise is *under the seal of the promisor,* the common law never relaxed its requirement that the action should be brought by the promisee alone, or his personal representatives, and not by anyone *for whose benefit,* ever so expressly, the promise was made; a rule which is particularly inflexible where the deed is an indenture or *inter partes.* Thus, if in a deed indented, between A of the first part and Z of the second part, there be contained a stipulation that Z should pay C $1,000, C can maintain no action for the money; and even if it be a *deed poll,* whereby Z stipulates with A that he will pay C $1,000, the better opinion is that, at common law, no action is maintainable by C. (1 Chitty Pl. 3, 4; Ross *v.* Milne & ux., 12 Leigh 204, 218 & seq.)"

Professor Burks, in his most valuable work on Pleading and Practice, quotes the foregoing extract from Professor Minor, and continues: [31]

"Whatever may have been the rule at the ancient common law with reference to a deed poll where Z stipulates with A that he will pay C $1000.00, it has been held several times in Virginia that even at common law and independently of statute, the beneficiary C could maintain an action in his own name. It is said that such beneficiaries not described as parties in deeds poll, or even mentioned as having a beneficial interest therein, may sue thereon in their own names if it manifestly appears that the covenants were made for their benefit, but the beneficiary must be pointed out and designated *in the instrument* though it is not necessary that his name should in terms be used."

It is to be borne in mind that we are not here discussing the

[31] BURKS PL. & PR., 50.

theoretical correctness of the doctrine that the stranger-beneficiary has a right of action upon the contract made for his benefit, but are simply seeking to determine the past and present status of the common law of Virginia upon the question. There seems to be ample authority for the assumption that in this state, independently of statute, if A be indebted to B, and B to C, *upon simple contract,* and A for valuable consideration undertakes to pay B's debt, C may by legal action enforce the contract in his own name.[32]

THE STATUTE.

Section 2415 of the Code of 1887 was first carried into the statute law of the state in the Revision of 1849,[33] and the purpose and effect of that enactment are material inquiries in this discussion. One of the revisors of the Code of 1849 was Mr. Conway Robinson, who, in his monumental work on Practice, has given the history of the adoption of the section, and throws some light on the purpose sought to be accomplished thereby.[34]

The distinction made at common law in the application of the rule permitting action by the stranger-beneficiary of the contract, as applied to deeds *inter partes* and to deeds poll and simple contracts is first pointed out by the author, it being shown that in the first case a stranger could not sue, while in the latter a right of action was generally allowed those beneficially interested. In order to permit one not a party to a deed *inter partes,* but for whose benefit a covenant is therein inserted, to enforce the same, the revisors proposed a section reading as follows:[35]

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[32] Authorities cited and discussed *supra.*

[33] Code 1849, Chap. 116, Sec. 2, identical with Code 1887, Sec. 2415, which reads as follows: "An immediate estate or interest in, or the benefit of a condition respecting, any estate, may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise."

[34] 3 ROBINSON, PR., pp. 14-23.

[35] See note of revisors to proposed sections. 3 ROBINSON, PR., pp. 17, 18.

"An immediate estate or interest in, and the benefit of a condition or covenant respecting any estate, real or personal, may be taken by a person, although he be not named a party to the instrument."

Mr. Robinson said:

"The joint committee on revision while concurring with the revisors in this proposition, saw occasion to go yet farther. To understand the object of the amendment proposed by that committee, it may be proper to advert to the course of decision as to the right of action on a promise for the benefit of a person with whom it was not made or with whom it was made jointly with others."

The English and American authorities, and Ross *v.* Milne are discussed at some length,[36] and the following summary of his discussion is made:[37]

"In view of the decision of Ross *v.* Milne—which it will be perceived was in an action on a promise as well as on a covenant—the joint committee on revision struck out the section mentioned *ante* p. 17, as reported by the revisors, and in lieu thereof inserted the following:"[38]

The first object of the statute was, then, to abolish the distinction between deeds *inter partes* and deeds poll as to the right of third parties claiming benefits thereunder, which object would have been accomplished by the section proposed by the revisors, but the legislative committee had in mind an additional object, which second object was, according to Mr. Robinson, to change the law as laid down in Ross *v.* Milne.

Reverting to that decision, we find that the proposition of law there decided was that the beneficiary of a simple contract, who is neither a party nor privy thereto, and who has given no consideration therefor, cannot enforce at law in his own name the agreement made for his own benefit, where the promisee had no beneficial interest in the performance of the contract. The case did not involve a consideration of the rights of a third party where the promisee was likewise beneficially interested, and the opinion of the revisors and of the legislative committee as to the

[36] Id., pp. 18-22. [37] Id., 6, 23.
[38] Here is quoted Chap. 116, Sec. 2, Code 1849.

state of the law in such case is not clear from Mr. Robinson's discussion. That there was considerable authority upholding the third party's right of action in such case is apparent from the discussion already had. On the other hand, in the New York, Pennsylvania and South Carolina cases cited and discussed by Mr. Robinson,[39] a distinction seems to have been made by those courts between cases in which the third party alone was beneficially interested, and those in which the promisee was also beneficially interested, a right of recovery in assumpsit being permitted in the former case, but the plaintiff being relegated to his equitable remedy in the latter. Whether or not, however, it was the purpose of the Legislature to bring the law into harmony with that of the jurisdictions noted, is immaterial. The statute, according to its terms, and by virtue of its declared purpose, dealt only with the case of the sole beneficiary and left the rights of a third party in the case where the promisee was also a beneficiary, absolutely unchanged.

Construction of the Statute.

The distinction above noted has not been observed by the Virginia court in construing the statute.

Jones *v.* Thomas,[40] was an action of covenant by W. A. Jones upon the following instrument:

> "March 12, 1863."
>
> "I hereby bind myself, my heirs etc., to pay ——— the amount of principal and interest due from W. A. Jones on the tract of land purchased by him of G. W. Jones and wife. Witness my hand and seal the day and date above."
>
> "Abijah Thomas (Seal)."

One of the points in issue was the right of W. A. Jones to maintain the action, it not appearing whether the covenant was with him or G. W. Jones. The court finds that the covenant was with W. A. Jones and says:[41]

"If the covenant in this case had been made in fact with

[39] 3 Robinson, Pr., pp. 20-22.

[40] 21 Gratt. 96 (1871).

[41] Id., pp. 101, 102. Author's italics. Chap. 116, Section 2, Code of 1860, is identical with section 2415, Code of 1887.

George W. Jones, as it might have been, there would be no question of his right to sue thereon in his own name. *And I am inclined to think that, as it was for his benefit, although not made with him, he might maintain the action under the provisions of the 2d sec., chap. 116, Code of 1860.* These provisions, however, do not affect the interest of Wm. A. Jones, the plaintiff in error. The effect of the statute is not to divest rights, but to afford remedies to parties not allowed by technical rules of pleading at common law."

The italicized words are plainly *dictum,* and the intimation of the court is unsound. G. W. Jones was not the sole beneficiary of the contract, and was, therefore, entitled to no rights by virtue of the statute. His rights, if any, were common law rights, and the situation of the parties was exactly that presented by Judge Tucker's illustration in Ross *v.* Milne, where A was indebted to B, and B to C, in which case it was the court's opinion that C would have a common law right of action on A's promise to B, to pay the latter's debt to C.

The case of Clemmitt *v.* New York Life Ins. Co.,[42] is instructive. In that case one Minnis insured his life for $5,000 for the benefit of his wife, Mary Jane, with the further provision that in case of the death of the said Mary Jane Minnis before the insured, the insurance should be payable to her children. This was an action for damages for breach of contract brought by insured's only daughter after the death of her mother. In sustaining the right of action, the court, per Burks, J., said:[43]

"As soon as she [Mrs. Minnis] died, the rights of the female appellant (her only surviving child) became vested—rights, as before stated, not derived through the mother, but directly from the company under the policy, for the enforcement of which the law gave her a personal remedy in her own name and for her own benefit. If there be any question whether at common law she could, for want of priority [privity?] maintain an action in her own name (see Ross *v.* Milne, 12 Leigh 204), all doubt is removed by our statute (Code of 1873, ch. 112, § 2), which plainly gives the right."[44]

[42] 76 Va. 355 (1882). [43] P. 360.

[44] The Code section referred to is identical with the corresponding sections of the Codes of 1849, 1860 and 1887.

It is scarcely possible that the court entertained any serious doubt as to the right of a beneficiary named in an insurance policy to recover thereon in his own name independently of statute. Certainly the right is very generally admitted by the American courts upon common law principles.[45] Nor does it altogether satisfy the curious student to dismiss the matter with the statement that the rule in this class of cases is *sui generis*.[46] It is to be noted, moreover, that the life insurance contract cannot, strictly speaking, be classed as a contract for the sole benefit of the named beneficiary. All such policies have loan and surrender values which may be appropriated by the insured with the consent of the beneficiary, and frequently such contracts are entered into with the primary purpose of protecting the financial obligations of the insured. Even where this is not the case, the insured is always beneficially interested in the contract by the protection afforded. The decision in the case cited might well have been rested upon the authority of Dutton *v.* Pool[47] and many early cases in this country following that decision.

In Stuart *v.* James River and Kanawha Co.,[48] the State of Virginia, by an act of the Legislature, had authorized the company to borrow a large sum of money to be evidenced by the bonds of the company secured by mortgage, upon condition that a debt of $180,000 due the state for money loaned the company and represented by bonds of the Commonwealth, be recognized as a part of the indebtedness of the company, and the same discharged to the Commonwealth or the holders of said state bonds. The suit was by a bondholder against the company, alleging that the company, by acceptance of the act in question, had rendered itself liable on the state's obligations. The court discusses the rights of third parties under contracts for their benefit, and determines that in this case no such right existed in the plaintiff; since the contract, if any, was not for his benefit, but for the purpose of relieving the state from the payment of obligations

[45] Wald's POLLOCK, CONTRACTS, 3 ed., 251; 3 AM. & ENG. ENC. LAW, 2 ed., 980. In this country, Massachusetts has a statute specifically giving the right, and the same is true in England.

[46] VANCE, INS., 393-4; Wald's POLLOCK, CONTRACTS, 3 ed., 251.

[47] *Supra*, note 13.

[48] 24 Gratt. 294 (1874).

amounting to $180,000. The force of the decision upon this point is, however, nullified by the finding of the court that the plaintiff had failed to allege in his declaration that a valid contract between the state and the company had ever been consummated.[49]

So in Newberry Land Co. *v.* Newberry,[50] the true meaning of the words "sole benefit" is not decided; since the court held that a corporation unchartered, and non-existent at the time of execution of a contract, took *no benefits at all* thereunder. The court says:[51]

> "It is plain from the agreement sued on in the case at bar that its primary object was not the sole benefit of the plaintiff, nor its object the benefit of the plaintiff at all, but that it was entered into for the mutual benefit of the parties to it, and of no other."

This case is, however, sometimes cited in support of the proposition that a substantial interest in the contract on the part of the promisee will defeat a recovery by the third party beneficiary, and there is perhaps sufficient in the court's *obiter dictum* to justify its use as persuasive authority on this point. It having, however, been determined that the corporation was not beneficially interested in the contract in question it is difficult to perceive what bearing a discussion of the question of what constitutes sole benefit could have on the matter in issue. In other words, the court must determine that the third party is a beneficiary and intended as such by the contracting parties, before the extent of his beneficial interest becomes a material inquiry; and, *per contra,* if it be determined that he takes no interest by the contract, a discussion relating solely to the quantity of interest is utterly vain.

The basis of the decision in Newberry Land Co. *v.* Newberry is the decision of the Supreme Court of West Virginia in Johnson *v.* McClung,[52] construing a statute of that state identical with section 2415 of our Code. The facts of that case were as

[49] Id., p. 301.
[50] 95 Va. 119, 27 S. E. 899 (1897).
[51] Id., p. 122. See also statement of the court, p. 120.
[52] 26 W. Va. 659 (1885).

follows: Johnson was a creditor of the firm of Anderson & Co., composed of two partners, to the amount of $700.00. Thereafter there were admitted to the firm two additional partners, who, in consideration of such admission, covenanted with the original partners under seal to personally assume and discharge one-half of the said indebtedness to Johnson. The action was by Johnson upon the covenant, claiming that it was for his benefit. The court held that, while the covenant was beneficial to the plaintiff, it was not intended to operate for his sole benefit, but was, rather, incidental to the agreement of the contracting parties, the primary object of which was to relieve the members of the old firm of their financial obligations to Johnson. The conclusions of the court as to the intent animating the parties to the contract, seems reasonable and fair, and if the case is made to turn solely upon the literal terms of the statute, the decision cannot be criticized. But what of the common law rights of the plaintiff, irrespective of the statute? In what respect, except that the action was upon a sealed instrument,[53] does the situation of the plaintiff in this case differ from that of the plaintiff in Cosmopolitan Life Ins. Ass'n *v.* Koegel?[54] In none of the authorities dealing with the common law rights of the third-party-beneficiary heretofore discussed, except in the early cases cited by Mr. Robinson, which have long since been overruled, is it suggested that a beneficial interest in the contract on the part of the promisee would bar the third party's right of action. On the contrary, all of these authorities unite in saying that, in such a case, the third party for whose benefit the contract is made has a right of action. Ross *v.* Milne holds that the sole beneficiary of a contract, where the promisee is not beneficially interested, is not entitled to its benefits. Is it not, then, a reasonable deduction, that the class of contracts in which the third party's rights are enforceable at common law, (a class to which the present case belongs) is in no wise affected by the statute which had as its purpose the establishment of rights nonexistent at common law, and that the rights and remedies of the

[53] As to this see discussion of McIlvane *v.* Big Stony Lumber Co., *infra*.

[54] 104 Va. 619, 52 S. E. 166 (1905).

parties in Johnson *v.* McClung should have been determined on common law principles without invoking the statute?

The error (if such it be) is perpetuated in the recent case of McIlvane *v.* Big Stony Lumber Co.[55] In that case, the Porterfield Lumber Company conveyed to St. Clair, trustee, who, as a part of the consideration, assumed payment of certain enumerated debts of the Porterfield Company. St. Clair, trustee, conveyed to the defendant corporation, which likewise assumed payment of the debts specified in the conveyance from the Porterfield Company. The action was a motion for judgment upon the covenant of assumption of the defendant, which it was sought to sustain under section 2415 on the ground that the defendant's covenant was for the sole benefit of the creditors of the Porterfield Company, specified in the foregoing conveyances. On the authority of the Newberry Land Co. *v.* Newberry, it is held:[56]

> "The statute does not enable one who is not a party to the deed to maintain an action thereon unless he is plainly designated by the instrument as beneficiary, and the covenant or promise is made for his sole benefit."

And, quoting Johnson *v.* McClung, the court further holds that those covenants are for the sole benefit of a third party, in which the primary object of the parties to the contract is such a benefit, and in which such benefit is not merely incidental to the contract.

So far as the statute is concerned the decision is unexceptional, but from the standpoint of the common law it is open to the same criticisms which apply to Johnson *v.* McClung.[57] If, as was said in Jones *v.* Thomas,[58] "the effect of the statute is not to divest rights, but to afford remedies to parties not allowed by technical rules of pleading at common law," it would seem that to make the plaintiff's rights in this case absolutely dependent

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[55] 105 Va. 613, 54 S. E. 473 (1906).

[56] Id., p. 620.

[57] It is but fair to state that the plaintiff's case seems to have been rested entirely on the force and effect of the statute, and no question raised as to his common law rights.

[58] 21 Gratt, 96, 102 (1871).

upon the statute, would give to the statute quite the contrary interpretation.

The objection that at common law the plaintiff would have had no rights by reason of the nature of the instrument (deed *inter partes*), and hence must rest his claims upon the statute and be governed by its terms, puts upon the statute a construction too narrow and limited, in view of its conceded purposes. The first paragraph of the act abolishes the distinction between sealed and unsealed instruments, and if the statute had stopped there, according to the views above set out, the mortgagee would have had his right of action against the mortgagor's grantee upon the latter's covenant, even though contained in a deed *inter partes*. But the Legislature was not content to effect this reform alone; its purpose was to provide and establish other and additional remedies in cases of the Ross *v.* Milne type. The effect of the second section of the statute is cumulative, not restrictive; constructive, not destructive. Would it not be rather absurd, in view of the known purposes of the statute, to say what was given in the first sentence of the statute was retracted in the next? In other words, the first paragraph of the statute relates to all contracts in which a third party is beneficiary; the second paragraph relates only to such contracts as involve the rights of a sole beneficiary, and in which the promisee is not beneficially concerned.

An interesting discussion of the purpose and effect of the statute (although unnecessary to the decision of the case) is contained in a recent decision of the Circuit Court of Appeals,[59] the opinion being by McDowell, D. J., Goff and Simonton, C. JJ., concurring. In that case a contract had been made by the City of Newport News with a construction company to complete certain work within a specified time. For failure so to do, the City was to deduct the sum of $25.00 for each day in excess of the time limit, to be paid to the engineer in charge of the work. The action was by the engineer in assumpsit for the specified *per diem*. In discussing the effect of section 2415, the court, after setting forth the statute, says:[60]

[59] City of Newport News *v.* Potter, 122 Fed. 321 (1903).

[60] Id., p. 326. Author's italics.

"It is urged upon us that this statute does not give Potter the right to base an action on clause 23 of the Honan contract. It is said that the covenant in that clause is not solely for Potter's benefit, but partly for the benefit of the city, and that the benefit to Potter is only incidental. We think the statute was enacted for a double purpose. One was to change the rule of the common law that one not a party to a deed *inter partes* could not sue for a breach of covenant therein made for his benefit. *The other purpose was to change the common law rule that a suit for a breach of covenant made with two persons for the benefit of one of them must be jointly brought by both the covenantees. Hence the words 'sole benefit' in the statute are not to be construed as relating to the covenantor, but as relating to the other joint covenantee. The covenant in clause 23 was certainly not made for the benefit of Honan & Sons. As between them and Potter, the covenant is for the sole benefit of the latter. It follows that it is immaterial whether or not the covenant was intended to benefit the city, and it is also immaterial whether it was intended primarily or incidentally to benefit Potter.* But as the question has been raised we may say that we regard clause 23 as having been intended primarily to compensate Potter in case of delay in completion of the work beyond the contract period, and was intended to be of benefit to the city only incidentally, in that it penalized the delay by the contractor. See 1 Chitty, Pl. 4, 5; 3 Rob. (New) Pr. 16-23; Ross *v.* Milne, 12 Leigh 209, 37 Am. Dec. 646; Jones *v.* Thomas, 21 Gratt. 96; Clemmitt *v.* Insurance Co., 76 Va. 360."

Conclusion.

In the type of cases of which McIlvane *v.* Big Stony Lumber Co. is an illustration, it is our conclusion: First, that the common law of Virginia was practically the doctrine subsequently laid down by the Supreme Court of New York, in the familiar case of Lawrence *v.* Fox.[61] The gist of that decision was that in order to sustain the right of action by a stranger to a contract, it must be made to appear, first, that the contracting parties entertained the purpose to benefit the third party by their agreement, and, second, that there existed some obligation or duty owing from the promisee to the beneficiary, which would

[61] 20 N. Y. 268 (1859).

give the latter some legal or equitable claim to the benefit of the promise. Privity between the third party and the promisor is not essential, but privity between the third party and the promisee is essential in order to effect by substitution a legal relation between the former and the promisor.[62] Second, the purpose of the statute was probably three-fold, (a) To abolish the common law distinction between deeds *inter partes* and deeds poll as affecting the rights of third parties. (b) To change the rule laid down in Ross *v.* Milne, and to give a right of action to the beneficiary of a contract even where there was no legal or equitable duty owing to him from the promisee, in which case, the doctrine of Lawrence *v.* Fox was inapplicable. This is the true meaning of the words "sole benefit" as used in the statute.[63] (c) A third purpose was probably that suggested by Judge McDowell in City of Newport News *v.* Potter, and also adverted to by the court in Johnson *v.* McClung, namely: to give to one of two joint covenantees, who is alone beneficially interested in the performance of the contract, the right to enforce the same in his own name without joining as plaintiff the other covenantee. Third, the purpose of the statute, as declared in Jones *v.* Thomas, was not to divert any existing common law rights, but to create additional rights not recognized at common law. Fourth, if these premises be sound, an action of assumpsit should lie in this class of cases, entirely independently of section 2415 of the Code.

To summarize this discussion, we conclude: 1. Where land is purchased subject to existing mortgage, but without specific covenant on the part of the purchaser to discharge the same, there is no personal liability whatever on the part of the purchaser.[64] 2. When the successive grantees of the mortgagor specifically covenant to pay the mortgage debt, they are personally chargeable by the mortgagee upon their covenants, in a suit in equity, provided the chain of assumptions is unbroken, and in such case, the last assumer is liable as principal debtor, and his

[62] See analysis and discussion of Lawrence *v.* Fox, in Vrooman *v.* Turner, 69 N. Y. 280 (1877).

[63] See quotation from Wald's POLLOCK, CONTRACTS, *ante*, pp. 466, 467.

[64] *Ante*, p. 464.

predecessors in title as sureties for his undertaking.[65] 3. Under the conditions last stated, the equitable remedy is exclusive, and assumpsit will not lie.[66] 4. Where the chain of assumptions is broken, one who, subsequent to such break, covenants to pay the mortgage debt, is liable on his promise in an action of assumpsit, but cannot be held liable in equity.[67] 5. Under the conditions stated in 2, *supra,* the mortgagee should be permitted to sue at law, upon their covenants, any of the successive alienees of the mortgagor, and the decision of McIlvane *v.* Big Stony Lumber Co. should be limited strictly to the applicability of the statute to such cases. Virginia is entirely out of line with the current trend of authority in this country in limiting the creditor to his equitable remedy,[68] and reasons of expediency, as well as legal reasons of weight, demand this limitation of the scope of the decision.

John Randolph Tucker.

RICHMOND, VA.

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[65] *Ante,* p. 464.
[66] McIlvane *v.* Big Stony Lumber Co., *supra.*
[67] Casselman *v.* Gordon, 118 Va. 553, 88 S. E. 58 (1916).
[68] *Ante,* notes 14 and 15.